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Editorial

Although we have only just turned the page on the calendar to May, the storms of inflation are already raging all around us and disrupted supply chains threaten to cause calamity in several sectors. The promising growth of the Czech economy in the first quarter of the year was interrupted by the thunder of war, and businesses are struggling with rising prices of energy and other inputs. Solutions must be sought before the problems get any deeper: the fuel price hikes are to be curbed by new government measures passed by the chamber of deputies last week. These are mainly changes in road tax, income tax and excise duties, which we summarise in the tax section.

Also noteworthy is an amendment to the Act on Registration of Beneficial Owners which only entered into effect less than a year ago. As we point out in the legal section, the changes will not be just cosmetic.

Despite the frosty circumstances, for us, spring remains a period to hold public events. Please note the workshops on news in subsidies: they have been prepared by the team that has helped companies reach subsidies of over billion crowns. The new programming period brings exceptional opportunities also for businesses that could not so far have benefited from public aid. We look forward to seeing you in Brno.

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Legal

Recognition of Ukrainian qualifications still difficult

The European Commission has issued recommendations to member states to simplify the administrative procedure and ensure a speedy recognition of the professional qualifications of Ukrainians seeking refuge in the EU.

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Among the refugees coming from Ukraine because of the war are many qualified employees, such as teachers or doctors. However, due to complex procedures for the recognition of diplomas, they usually cannot practice their profession. If they need to start work quickly, they often have to take unskilled jobs, at least for the time being.

Since many refugees were unable to take all their necessary documents with them, the Commission calls upon the member states to also accept documents that are not originals (e.g. digital copies), not to require certified translations and, where possible, to remove other obstacles, by, e.g., waiving fees for applying for the recognition of qualifications. The Commission also calls for a flexible approach and the elimination of any restrictions and requirements that are not strictly necessary for the recognition of qualifications.

The recommendation is not binding upon the member states. Currently, the Czech Republic recognises the qualifications of, e.g., workers in children's groups: they have been allowed to work thanks to Lex Ukraine. Another group under discussion is that of health professionals: the Ministry of Health has issued methodological instructions on the employment of health professionals from the ranks of medical and non-medical staff. Its wording is available here.

If refugees are allowed to work in positions corresponding to their qualifications, it will benefit key sectors of economy where there is currently a shortage of skilled labour. At the same time, it will protect refugees from being used as cheap labour by unreliable employers or intermediary agencies.

Until the system of recognition of qualifications for specific professions is regulated as is the case for workers in children's groups, employers have to proceed in a standard manner.

Chamber of deputies partially abolishes road tax and supports electromobility

In response to high fuel prices, the chamber of deputies approved a government bill partly abolishing the road tax and granting tax advantages for the use of low-emission vehicles.

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Road tax

Within the limits of applicable EU legislation, the bill abolishes the road tax for cars and buses and reduces the tax liability for trucks: a tax liability should only arise when a specified number of axles and total weight (e.g., for vehicles with two axles, 12 tonnes) is exceeded. The proposed changes shall already apply for 2022, regardless of when the law enters into force. The duty to pay advances on road tax for all types of vehicles during 2022 has already been abolished by the Minister of Finance. At the same time, the government plans to take advantage of the possibility to abolish the road tax under EU legislation: this is possible if the member state has introduced a toll system for traffic charges on selected roads; the Czech Republic fulfils this condition.

Income tax

The government's proposal also reduces the amount of taxable income that is added to the tax base of employees using company cars for private purposes. For low-emission vehicles, this amount will be 0.5% of the purchase price of the vehicle instead of the current 1%. A low-emission vehicle is defined as a road vehicle in the M1, M2 or N1 category that does not exceed the CO_2 emission limit of 50 g/km and 80% of the emission limits for air pollutants as per the supplement/EU regulation on type-approval of motor vehicles with respect to emissions from light passenger vehicles (Euro 5 and Euro 6). The new rules should apply starting from the 2022 taxable period, regardless of when the vehicle was acquired. The months in which the low-emission vehicles were used for private purposes and the law was not yet effective will be considered in the annual settlement of advances.

The bill further shortens the depreciation period of equipment serving exclusively the charging of electric vehicles or vehicles powered by an internal combustion engine and an electric motor (classic charging stations as well as wallboxes) from 10 to 5 years by reclassifying them from the third to the second depreciation group. Taxpayers who have acquired charging stations before the act’s effective date should be able to reclassify them into the second depreciation group in the 2022 taxable period, or include them directly in this group if they have not yet been depreciated.

The bill also includes an amendment to the Air Protection Act abolishing the obligation to mix biofuels into fuels. The bill will now be considered by the senate.

Chamber of deputies temporarily reduces excise duty on diesel oil and petrol

To mitigate the effects of the energy crisis on fuel prices, the government has proposed an amendment to the Excise Duty Act, whereby the excise duties on diesel oil and unleaded petrol are to be temporarily reduced by CZK 1.50 per litre from 1 June to 30 September 2022. The excise duty on a litre of petrol would thus fall from CZK 12.84 to CZK 11.34, and for diesel oil from CZK 9.95 to CZK 8.45.

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Given that excise duty also enters into the calculation of VAT on fuel, this should mean a reduction in prices at fuel stations by up to CZK 1.80 per litre. The Ministry of Finance plans to monitor the prices fuel distributors (excise duty payers) charge to make sure that the reduced tax is reflected in the final prices for drivers.

The reduction in excise duties shall only apply to petrol and diesel oil released into free tax circulation in the period from 1 June to 30 September 2022; it shall not apply to mineral oils that, although produced during that period, are not released into free circulation during that time.

Also, some refunds of excise duties on diesel oil consumed in primary agricultural production (‘green diesel’) have been temporarily reduced, based on the EU minimum rates stipulated by the Energy Taxation Directive. The amount of the refund is to be temporarily reduced from CZK 8.50 to CZK 7.30 per litre.

The amendment is being debated in a fast-track legislative process: the chamber of deputies approved it on Tuesday, 26 April, and once confirmed by the senate, it could enter into force on 1 June 2022.

Development in administrative practice for fuel cards

The VAT treatment of fuel cards is a closely watched topic. Although the cards are frequently used by vehicle operators to refuel, the VAT Act does not offer any detailed guidance on the correct application of the tax: the VAT treatment of these transactions has always been based on general principles and on interpretations of international case law. Recently, the European Commission's VAT Expert Group has commented on this topic.

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The most used business model is the ‘Buy/Sell’ model: when getting fuel, the vehicle operator purchases fuel from the service station operator in the name and for the account of the fuel card issuer. The transaction thus includes three parties: the service station operator, the card issuer, and the vehicle operator. From a VAT perspective, purchasing fuel is regarded as two consecutive supplies of goods (fuel) — the service station operator supplies it to the card issuer, and the card issuer supplies it to the vehicle operator. Physically, the vehicle operator takes the fuel from the service station operator. In practice, the ‘Commissionaire’ model is also used, which involves the same VAT treatment as the ‘Buy/Sell’ model.

This VAT treatment has so far been accepted by the financial administration. An alternative approach was formulated by the Court of Justice of the European Union in judgement No. C-235/18 Vega. However, the judgment concerned a rather less common situation, where the owner of the fuel card (a parent company) provided the card to their subsidiary acting as a subcontractor for the parent company. The court regarded the transaction between the parent company and the subsidiary to be a financial service exempt from VAT (not a supply of goods — fuel).

Following the CJEU judgment, the VAT Expert Group carried out a detailed analysis, considering the specificities of the fuel card market. According to their conclusions, the Vega case must be viewed solely in the context of the very specific situation, and the related conclusions of the court must be interpreted narrowly. The VAT Expert Group is of the opinion that adopting a wider application of the judgment would have an adverse impact on the fuel card sector.

The Expert Group's comments have now been submitted to the European Commission's VAT Committee. According to the information available to us, the Committee’s standpoint will be of essential importance also for Czech financial administration, as it will most likely respect the conclusions issued.

Transfer pricing on audit committee‘s agenda?

Transfer prices are part of the agenda of almost every medium-sized and large company. If the company is subject to audit, its audit committee should also be involved. Because of the implications that incorrectly-set transfer prices can have for the organisation, audit committee members need to have detailed information about the group’s transfer pricing status. But how is it in practice?

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Areas of responsibility of audit committees in relation to transfer pricing

Audit committees have many responsibilities within a corporate group, ranging from the oversight of external reporting (in particular financial reporting), internal control systems and their functioning, and external compliance among others.
Although it may not seem so at first, transfer pricing can have implications for the responsibilities of the audit committee, as they may affect:

- external reporting, e.g., in the context of income tax provision, deferred tax, provision for tax risks
- internal control system, considering the size of potential risks in transfer pricing, both in monetary terms (reassessment of transfer prices by the tax authorities with a consequential increase in taxes due) and reputational terms (the image of a company could be damaged by potential claims of tax avoidance)
- compliance: in many countries, the preparation of transfer pricing documentation is obligatory.

What does the current situation look like?

Audit committees are not very interested in transfer pricing because it is perceived as a very specific topic with numerous details and often as a mere compliance obligation that needs to be dealt with in a routine manner. This perception completely overlooks the far-reaching implications that transfer pricing may have for a group — not only regarding compliance and reporting, but also from a reputational perspective.

In the past years, numerous multinational entities have suffered reputational damage from transfer pricing-related topics. Their transfer pricing policies and structures have been scrutinised by tax authorities or by the European Commission (in the context of possible state aid), but especially by the public. The implications of reports of tax avoidance in the media may affect consumers and possibly may result in lower revenue for these groups.

Topics such as a global minimum tax rate and ESG are also likely to affect a group’s transfer pricing policy and could contribute to increase the group’s transfer pricing-related risks. A higher level of involvement from the audit committee is therefore important.

What could the audit committee's involvement look like conceptually?

Given its main responsibilities, the audit committee should be informed about:

- the main characteristics of the group's transfer pricing system setup, including an evaluation of the main risks connected with it; this is necessary so that the audit committee can evaluate whether the risks connected with the current transfer pricing system are in line with the organisation's risk appetite
- the compliance status in terms of transfer pricing documentation as well as other compliance obligations
- significant ongoing tax inspections in which transfer pricing plays a major role: such tax inspections may also lead to broader implications such as reputational issues and need to be on the audit committee's radar.

Based on this information, the audit committee may then require further information on individual topics that are identified as specific risk areas requiring more detailed attention.

What comes after a tax inspection?

The tax inspection process can be long, but even the most tedious review will come to an end eventually. Let's take a look at how an inspection is closed, when the additionally assessed tax is due, how to defend against the inspection findings, and what else to keep in mind.

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As the end of a tax inspection approaches, **the report on the inspection findi**ngs to date is communicated, usually in the form of an extensive document in which the tax administrator summarises the entire inspection and presents its conclusions. You can comment on the conclusions within the time limit set by the tax administrator, which can be extended upon request. This is usually the last chance in the tax inspection process to try to change the tax administrator's mind.

The tax inspection ends with the delivery of a **notice of the end of the tax inspection**, accompanied by the tax inspection report. The report, again, describes the course of the inspection and, above all, contains the final assessment of the tax administrator. The text is usually the same as the report on the inspection findings to date, plus the taxpayer's response. If tax is to be assessed based on the tax inspection, the tax amount is quantified in the report. The tax inspection report is undoubtedly one of the most important documents arising from a tax inspection, but it is not a decision in itself, so it cannot be appealed, and its receipt is not decisive for determining the date from which time limits start to run again.

If the tax inspection ends with an **additional tax assessment**, an order to pay tax must be delivered, usually a supplementary one. The order is usually very brief compared to the tax inspection report: just a new tax calculation with a reference to the tax inspection report as a statement of grounds. The date on which the order is received is crucial for further action, as from this date the 30-day appeal period starts to run. This period cannot be extended upon request. By filing a blank appeal and completing it subsequently at the request of the tax administrator, you will have additional time to prepare your appeal arguments. In addition, you can continue to amend the appeal throughout the appeal period until the appellate authority's decision.

A frequent question at the end of an inspection is **"When do we have to pay the tax?"** Orders to pay tax contain information on the due dates and the usually confusing notice that filing an appeal has no suspensive effect. If you appeal the findings of the inspection, the tax is not due for the duration of the appeal proceedings, but only becomes payable when the final and conclusive decision is made, i.e., when the appeal proceedings are concluded or no appeal is lodged. Although it is not necessary to pay anything until then, paying the tax additionally assessed before it is due may prevent further interest on late payment.

An additional tax assessment usually involves **penalties**. We recommend applying for their waiver. The time limit for applying is three months from the date of final and conclusive decision, i.e., again, after the appeal procedure has been completed. It is also possible to apply for a waiver of the penalty even if you decide not to appeal against the additional tax assessment.

Sixth call to Environment for Life programme

The Technology Agency of the Czech Republic has announced preparations for the sixth call to participate in the Environment for Life programme, aimed at supporting environment-related applied research, experimental development, and innovation. The call has two sub-programmes.

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The main objective of the Environment for Life programme is to provide solutions leading to a healthy and quality environment and the sustainable use of resources. The call for proposals is scheduled to be launched on 29 June 2022, with the competition period running from 30 June 2022 to 14 September 2022. Proposals may also be submitted by large enterprises, and support will be provided for operating expenses.

Sub-programme 1 - Operational Research in the Public Interest - is aimed at supporting research and development projects whose results will be applicable in public administration, e.g., in eGovernment, digitisation, optimising regulation, or reducing administrative burdens.

Subprogramme 2 - Eco-Innovations, Technologies, and Environmental Protection Practices - will support projects aiming at innovative approaches leading to the mitigation of climate change impacts while reflecting the protection of natural resources, with total funds for allocation of CZK 200 million.

The maximum aid amount and the maximum aid intensity per project will be specified in the tender documentation. Subsidies should also be available for Prague applicants.

Seminar on funding opportunities

News on subsidies will be introduced at KPMG's "Subsidies as an Opportunity: News and Practice" seminar, during which we will be presenting the new 2021-2027 programme period and discussing various subsidy opportunities and practical experience with project preparation. You can attend the seminar online or in person in Prague or Brno.

Fourth call to TRANSPORT 2020+

On 6 April 2022, the Technology Agency of the Czech Republic announced the fourth call to participate in the TRANSPORT 2020+ programme.

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The competition will support applied research, experimental development and innovation projects while focusing on research in the entire transport sector for all types of transport, i.e., land, water, and air, including all types of transport vehicles and infrastructure. Each proposal must meet one of the specific objectives of the programme, such as sustainable transport, safe and resilient transport and transport infrastructure, accessible and interoperable transport, or automation, digitisation, navigation, and satellite systems.

The call period will run from 7 April to 1 June 2022. Project implementation can start no earlier than January and no later than February 2023. The project implementation can take from 12 to 48 months and the latest date for completion of the project is set for December 2026. Total funds for allocation amount to CZK 495 million. The maximum subsidy amount per project is set at CZK 50 million. The maximum aid intensity is shown in the following table:

Types of candidates / Activity categ.	Maximum intensity - industrial research	In case of effective cooperation	Maximum intensity - exp. development	In case of effective cooperation
Small-sized businesses	70%	80%	45%	60%
Medium-sized businesses	60%	75%	35%	50%
Large businesses	50ˇ%	65%	25%	40%
Research organisations	100%			
Other candidates	100%			

Who is eligible for support?

Only an entity that has its registered office, place of business or branch in the Czech Republic can be a candidate. The project can be carried out independently or in cooperation with other participants. An unlimited number of project proposals can be submitted. This call for proposals offers support to cover personnel expenses, subcontracting costs, and other direct and indirect costs.

Amendment to Act on Register of Beneficial Owners

Less than a year has passed since the new law on the registration of beneficial owners came into force, and already the Ministry of Justice together with the Ministry of Finance is proposing an amendment to change, inter alia, the beneficial owner definition.

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The draft amendment has not yet been submitted to the deputies; the inter-ministerial comment procedure has just been completed. The amendment is proposed to take effect on the day following its promulgation; the moment of applicability of the proposed changes will therefore depend on the speed of the legislative process.

This is not just a technical amendment to remove some inaccuracies in the existing legal regulation, but a significant change in determining beneficial owners. The proposal drops the terms "person with ultimate influence" and "ultimate beneficiary" and now defines beneficial owner as "any natural person who ultimately owns or controls a legal person or legal arrangement".

According to the newly amended de⊠nition, the beneficial owner in a business corporation is any natural person who

- is the controlling person pursuant to the Corporations Act
- owns or controls the corporation by:
  - holding a direct interest or shareholding or voting rights including bearer shares of more than 25%
  - having a direct or indirect right greater than 25% to a share of profits, other own funds, or a liquidation balance
  - may control a corporation or corporations that individually or collectively hold an interest or bearer shares in the corporation greater than 25%
  - may control the corporation by other means (control is, inter alia, defined by the criteria set out in the Directive of the European Parliament and of the Council).

The definition of the material beneficial owner for foundations, institutes, public-benefit corporations, or trusts (in the wording of the act ‘other legal arrangements’) will then be newly established directly in Section 6 which deals with these persons and legal arrangements. For these persons and arrangements, the beneficial owners will still be certain specific persons whose position of beneficial owner results from their function (e.g., founder, trustee, nominated beneficiary). However, it will also be necessary to ascertain whether there is another person who would ultimately own or control them.

The amendment also introduces minor changes to automatic entries into the register of beneficial owners and to the definition of persons who do not have a beneficial owner. Other changes are of a more formal or technical nature. The registration and sanction processes remain essentially unchanged.

According to the transitional provisions, registrants (e.g., companies) will be obliged to adapt their record in the register to the new regulation within 6 months from the date the new law enters into effect. These persons should then be exempted from paying the court fee.

Beware of errors in personal data protection impact assessments

The Office for Personal Data Protection (OPDP) has published its annual report for the past year, drawing attention to the mistakes made by data controllers in the processing of data protection impact assessments (DPIAs).

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A DPIA must be performed where the processing of personal data is likely to result in a high risk to the rights and freedoms of natural persons. This must always be assessed considering the nature, scope, context, and purpose of the specific processing. E.g., this may involve large-scale automated evaluations of personal aspects relating to natural persons, large-scale processing of sensitive personal data, or large-scale systematic monitoring of publicly accessible premises.

The purpose of the DPIA is, inter alia, to assess the necessity of the processing, evaluate the risks involved, and plan measures to manage those risks, including security measures and mechanisms to ensure the protection of personal data.

According to the experience of the OPDP, the most frequent errors in the DPIA are as follows:

- A description of the means for the protection of data subjects' rights is missing or insufficiently elaborated.
- The description of the technical and organisational measures adopted tends to be general and, moreover, it is unclear how the DPIA submitter arrived at them, e.g., the OPDP's methodology is not used, and the data controller's own methodology is not clear either.
- The problematic implementation of 'balancing tests' when the necessity, suitability and proportionality of the personal data processing cannot be verified.

In case of any uncertainties, data controllers are advised to contact an expert or to consult directly with the supervisory authority before starting the actual processing.

SAC paves way for assessment of additional tax on transactions with unrelated parties

The Supreme Administrative Court has opened transfer pricing’s Pandora's box by allowing tax administrators to assess additional tax based on overall profitability not just for related-party transactions, but also for transactions with unrelated parties. If the conclusions of this judgment 7 Afs 398/2019 - 49 hold up in the light of future case law, we can expect the financial administration to be more active in assessing additional tax for taxpayers operating within a corporate group.

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The Income Tax Act, which regulates transfer pricing, stipulates that the tax administrator shall adjust the taxpayer's tax base if there is an unsubstantiated difference between the prices agreed with related parties and the prices that would be agreed with unrelated parties in normal business relations under the same or similar conditions.

As we can see from the wording of this provision, an adjustment of the tax base should only be considered once the tax administrator identifies transactions with related parties that differ from standard market conditions. Up until now, this was confirmed by both case law and the financial administration’s approach.

In the present case, the SAC concluded that even transactions with an unrelated party may be regarded as controlled transactions: if they had been influenced by a related party. In particular, where the parent company determines the distribution of functions and risks, it should compensate the manufacturer for the risks borne by them that they, in their position of a contract manufacturer, cannot control. The same conclusion was previously formulated by the regional court, which stated that the taxpayer should have received compensation from the parent company for the loss incurred. This means that once the financial administration authorities deduce that a taxpayer’s transactions with an unrelated party were influenced by a related party, according to the SAC, the transactions with the unrelated party do not have to be examined on an individual basis, but all these transactions en bloc shall be subject to an adjustment of the tax base.

The court therefore confirmed the tax administrator’s and subsequently the regional court’s suggestion that if transactions with unrelated parties that cannot be considered at arm’s-length are identified, the taxpayer should be compensated for their ‘hypothetical service’ (in this case, the loss-making production). In the court’s opinion, it is not relevant which of the related persons specifically benefited from the hypothetical service; however, the court admitted that usually the parent company will be the liable person.

The SAC has thus opened transfer pricing's Pandora's box: its judgment has allowed the financial administration authorities to assess tax based on overall profitability, i.e., not only for transactions with related parties, but also on those with unrelated parties, even though the taxpayer had negotiated the conditions (prices) with them at arm's length. This considerably widens the burden of proof on the taxpayer's part: they will now have to prove the absence of a 'service to the group' (or not being influenced by another company in the group) for transactions with unrelated parties as well.

Given the significant departure from the current judicial decision-making practice in the context of transfer-pricing, the question remains whether this decision will also hold up in the light of other SAC case law.

Case law

Interest on retained excess VAT deductions: SAC clarifies practice

In its current judgment, the Supreme Administrative Court (SAC) revisited the topic of interest on retained excess VAT deductions. This time, the court declared unlawful the practice whereby as of 1 July 2017 the tax administrator reduced the interest rate during the interest period of a long-term retained VAT deduction. Taxpayers are entitled to interest at a rate twelve percentage points higher than the one applied by the tax administrator.

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Until 2015, Czech laws did not explicitly regulate interest on retained excess deductions: it was only inferred by the SAC case law, which, in view of the requirements of the EU VAT Directive, granted taxpayers the right to interest at the repo rate plus fourteen percentage points. Subsequently, a legal amendment introduced interest on the deductions in the amount of the repo rate plus one percent. In 2020, the SAC held that this level of interest was contrary to EU rules and declared it inapplicable; the fixed part of the interest rate was to remain at fourteen percent, as before 2015. However, even before this judgment, in response to the development of EU case law, Czech legislators from 1 July 2017 also increased the interest rate to the CNB's repo rate plus two percentage points. According to the transitional provisions, the new rate was to apply only to the interest on deductions based on tax returns filed after the amendment.

Practice: confusion about the rate

The financial administration's practice also responded to the developments. When deciding on interest on retained VAT deductions, it started awarding interest at the repo rate plus fourteen percentage points for the period from 1 January 2015 to 30 June 2017, but then lowered the interest rate to the repo rate plus 2 percent from 1 July 2017. Thus, for the part of the interest period after 1 July 2017, the financial administration granted taxpayers interest rate twelve percent lower than in previous years. The correctness of this financial administration's approach was dealt with by the SAC in the current judgment No. 1 Afs 80/2021.

SAC: one interest rate shall apply for the entire period of interest

According to the SAC's judgment, the tax authorities' approach had no basis in the law, as it is not possible to start applying new regulations without explicit support in the law. Thus, according to the SAC, the retained excess deduction must bear interest at the original interest rate throughout the entire interest period. The first regulation being partly contrary to EU law the court considered irrelevant. Taxpayers are thus entitled to interest calculated using the CNB's repo rate increased by fourteen percentage points for the entire period of interest, as the SAC already inferred in its previous case law, even in the period after 1 July 2017.

We believe that this court decision will help many companies recover interest on money from retained VAT deductions they could not use for many years. However, the story of interest on deductions does not end with this judgment: the SAC has not yet assessed the compliance with EU legislation and CJEU case law of the interest rate after 1 July 2017 (CNB repo rate plus two percentage points). We have yet to wait for the final verdict on this chapter.

Overstepping search procedure boundaries may affect tax assessment deadline

In a recent decision, the Supreme Administrative Court commented on a tax administrator's overstepping of the boundaries of a search procedure, stating that the activity had in fact been a tax inspection. This had a major impact on the expiry of the period for assessing tax.

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In case *No. 7 Afs 39/2020*, the SAC dealt with a tax administrator assessing additional corporate income tax for 2013 based on the results of a tax inspection. The taxpayer challenged the point in time when the tax inspection started, as prior to its formal commencement on 2 April 2015, the tax administrator had already been carrying out a search activity concerning transfer pricing at the taxpayer from November 2014. During this period, the taxpayer provided the tax administrator with information about the company's activities, partial accounts of transactions carried out with related parties, some contracts for the provision of services, and other accounting documents.

The taxpayer challenged the additional tax assessment, claiming, inter alia, that the limitation period/deadline for assessing additional tax had already expired: the tax inspection had in fact started already in January 2015 when the tax administrator had requested accounting data used as a basis for compiling the tax return. The taxpayer thus argued that they had been delivered the assessment of additional corporate income tax for 2013 only after three years had already elapsed since the actual commencement of the tax inspection.

The SAC stated that if the tax administrator intends to comprehensively inspect the facts decisive for the correct determination and assessment of a particular tax, they must choose a procedure that allows them to take evidence. In this respect, the Tax Procedure Code does not recognise any procedure where this is possible other than a tax inspection and a procedure to remove doubts. Search activities are not such procedures.

The SAC agreed that the tax administrator's activities in the period from November 2014 to the drafting of the protocol on 2 April 2015 significantly overstepped the boundaries of a search activity, which consequently had the character of a tax inspection. By writing a protocol, the tax administrator only remedied their formal shortcomings. As a result, the tax was assessed after the deadline for assessing tax had already expired, meaning that the tax authority no longer had the power to assess the tax for the relevant tax period.

The SAC's decision thus once again shows how crucial breaches of the tax procedure rules and the overstepping of boundaries of tax administration procedures can be in the final outcome of tax proceedings (for more information, see also the article What constitutes a tax inspection?). If a tax inspection based on which an additional tax was assessed was preceded by the tax administrator's search activity, we recommend always watching out and assessing whether this may affect the procedural defence strategy.

VAT fixed establishments and foreign subsidiaries

The Court of Justice of the EU (CJEU) has dealt with the question of whether a parent company's VAT fixed establishment originates in another EU member state where its subsidiary is located and provides the parent company with marketing and other services.

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Berlin Chemie AG, a German company, sells pharmaceutical products for wholesale in Romania where it is registered for VAT. At the same time, it has a subsidiary in Romania, with which it has concluded a contract for the provision of marketing, regulatory, advertising and representation services. Under the contract, the subsidiary undertook to promote the German company's products in Romania, and to ensure all necessary regulatory steps to facilitate the distribution of these products. For those services, it invoiced a monthly remuneration calculated based on its expenditure incurred in the services provided, plus 7.5%.

Under the basic rule for determining the place of supply, the place of supply of the services was Germany. The Romanian company thus invoiced the services to Germany without VAT, in the reverse-charge regime. However, the Romanian tax authorities challenged this approach, claiming that the German company had a fixed establishment for VAT purposes in Romania, therefore the place of supply was in Romania, and requested that the German company pay VAT in Romania. The tax administrator argued that the German company had continuous access to technical and human resources at the subsidiary. The case reached the CJEU, which had to deal with several issues.

The CJEU confirmed that the existence of a subsidiary in the EU does not automatically give rise to a fixed establishment for VAT purposes. The court then addressed the question whether the technical and human resources must belong exclusively to the (German) company to give rise to a fixed establishment. In that regard, the court confirmed the earlier conclusions that it was not necessary for the resources to be the taxable person's own, but the taxable person must be able to use the resources as if they were just that. Furthermore, it is necessary that they do not use these resources only occasionally.

In the case in question, the German company used the human and technical resources of its subsidiary in Romania, which the subsidiary also used for its own economic activities. The CJEU emphasised that the same resources cannot be used to provide and, at the same time, receive the same services. In other words: it is not possible for the human and technical resources of the Romanian subsidiary to be at the same time regarded as a VAT fixed establishment of the German company in Romania. The German company thus does not have a structure in Romania that would allow it to receive services from the Romanian company there, hence, no VAT fixed establishment of the parent company originates in this case.

In brief

News in brief, May 2022

Last month’s tax and legal news in a few sentences.

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DOMESTIC NEWS

- Instruction No. GFD-D-57 on the location of files or their relevant parts at the tax authorities or the territorial offices of the tax authorities was published in Financial Bulletin of the Ministry of Finance No. 7/2022.
- The GFD has published selected questions on the amendment to the Accounting Act concerning the submission of financial statements to the Collection of Deeds through the income tax administrator. The questions and answers relate to the published information on the amendment to the Act on Accounting by Act No 609/2020 Coll.
- The Ministry of Labour and Social Affairs has launched the Smart Migration app for people fleeing the war in Ukraine. It offers the most important information about employment, healthcare, and education in Ukrainian, English, and Russian.
- The chamber of deputies has approved a bill extending income tax allowances for donations made in connection with the invasion of Ukraine. The bill will be discussed by the senate. You can find more information here.
- Act No. 93/2022, amending the Excise Duty Act and the Value Added Tax Act, was published in the Collection of Laws on 26 April 2022, implementing the EU Alcohol and Defence Directives.

FOREIGN NEWS

- At its meeting on 5 April 2022, the EU Economic and Financial Affairs Council (ECOFIN) once again failed to reach agreement on the revised proposal for an EU minimum tax directive to introduce a global minimum tax (OECD Pillar 2) within the EU. The new compromise text postpones the effective date of the Income Inclusion Rule and the Undertaxed Payment Rule to 1 January 2024 and 1 January 2025, respectively. Member states not having more than 12 ultimate parent companies falling under the Directive will be able to opt out of the global minimum tax until the end of 2029. The Czech Republic will probably not be affected by this exemption, as current preliminary estimates suggest that there may be more than 12 ultimate parent companies. The proposal will be discussed again at the meeting of 25 May 2022. More information here.
- The OECD has published the comments it received from the public in connection with its commentary on the rules for the introduction of a global minimum tax (OECD Pillar 2). KPMG also provided comments. More detailed information is available here.
- The OECD has published comments it received from the public in response to the publication of the draft rules for determining Amount A (allocation of the share of profits in countries where services are sold or consumed) under Pillar 1. KPMG also provided comments. For more information, see the KPMG report.
- The OECD has submitted for public consultation rules for excluding extractive industries from the Pillar 1 framework for the purpose of determining Amount A to be taxed in the market country. More information can be found here.

- The European Commission is asking for public consultation on new rules for the application of withholding taxes within the EU.
- On 6 April 2022, the European Commission issued a Commission Implementing Regulation providing essential details for payment service providers on how to report payment data in a harmonised format.
- The European Commission has published recommendations on how to improve VAT collection and make life easier for businesses.

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